

UNITED STATES DISTRICT COURT FILED
IN CLERKS OFFICE
DISTRICT OF MASSACHUSETTS

2006 MAR 17 P 12:32

U.S. DISTRICT COURT
DISTRICT OF MASS.

DERICK TYLER,
PETITIONER,

CIVIL ACTION

No. 04-12680-NMG

v.
DAVID NOLAN,
RESPONDENT.

PETITIONER'S CERTIFICATE OF
APPEALABILITY

NOW COMES THE PETITIONER, DERICK TYLER,
MOVES THIS COURT FOR A "COA" ON THE
DISMISSAL OF HIS 28 U.S.C. § 2254 PETITION
AS TIME-BARRED. IN SUPPORT HEREOF, THE
PETITIONER STATES:

1. A CRIMINAL DEFENDANT IN MASSA-
CHUSETTS CAN FILE A RULE 30(b) MOTION
FOR NEW TRIAL AT "ANY TIME" TO CHALLENGE
HIS CONVICTION. SEE MASS. R. CRIM. P. 30(b).

2. SINCE THE PETITIONER FILED HIS "FIRST"

-2-

POST-CONVICTION MOTION FOR NEW TRIAL IN 1999, HIS TIME UNDER § 2244(d)(1) DOES NOT START RUNNING UNTIL HE APPEALS HIS CONVICTION AND THE APPEALS PROCESS HAS RUN ITS COURSE. SEE GASKINS II, DUNN, 183 F.3d 8 (1st. Cir. 1999). IN GASKINS, THE PETITIONER FILED HIS § 2254 PETITION AFTER PROPERLY FILING COLLATERAL ATTACK MOTIONS WITH THE STATE. THE FEDERAL DISTRICT COURT DENIED GASKINS PETITION AS BEING "TIME-BARRED" BECAUSE THE DISTRICT COURT JUDGE RULED THAT THE TOLLING PROVISIONS DID NOT APPLY. THE FIRST CIRCUIT COURT OF APPEALS REVERSED RULING THAT "APPLYING THE TOLLING PROVISIONS ENCOURAGES RESPECT FOR THE PRINCIPLE OF COMITY AND COMPLIANCE WITH THE REQUIREMENT THAT, ORDINARILY, A STATE PRISONER MUST FIRST EXHAUST HIS STATE COURT REMEDIES BEFORE SEEKING FEDERAL

-3-

HABEAS RELIEF," GASKINS at 10. THAT IS JUST WHAT THE PETITIONER DID HERE, THE RESPONDENTS AND THIS COURT IS OVERLOOKING 28 U.S.C. 2244(d)(2).

3. SINCE MASSACHUSETTS HAS NOT SET FILING PRECONDITIONS FOR RULE 30 MOTIONS FOR NEW TRIAL, THIS MAKES HIS § 2254 PETITION "PROPERLY FILED" BECAUSE HIS STATE APPEAL CONFORMS TO MASSACHUSETTS FORMAL FILING REQUIREMENTS. SEE, E.G., CARTER V. LUTCHER, 275 F.3d 663 (7th CIR. 2001); SMITH V. WALLS, 276 F.3d 390 (7th CIR. 2002).

4. THE PETITIONER BELIEVES THE COURT'S RULING IS IN OPPOSITE TO RECENT LAW AND SEEKS A CERTIFICATE OF APPEALABILITY ON THE QUESTION OF WHAT IS "PROPERLY FILED" AS IT PERTAINS TO POST-CONVICTION MOTIONS FOR NEW TRIAL IN THE STATE COURT.

- 4 -

RESPECTFULLY SUBMITTED,

Derick Tyler

DERICK TYLER, PRO SE

J.B.C.C.

P.O. Box 8000

SHIRLEY, MD. 01464

DATED: 3/13/06

CERTIFICATE OF SERVICE

I, DERICK TYLER, CERTIFY THAT A COPY
WAS SERVED ON: JONATHAN M. OFILAS, AAG,
OFFICE OF THE ATTORNEY GENERAL, ONE
ANNBURTON PLACE, BOSTON, MA. 02108, BY
FIRST CLASS MAIL, POSTAGE PRE-PAID.

Derick Tyler

DERICK TYLER, PRO SE

DATED: 3/13/06